No. 94- 941837 MAY 8 1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BARNETT BANK OF MARION COUNTY, N. A.,

Petitioner,

v.

TOM GALLAGHER, INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, FLORIDA DEPARTMENT OF INSURANCE, FLORIDA ASSOCIATION OF LIFE UNDERWRITERS, PROFESSIONAL INSURANCE AGENTS OF FLORIDA, INC., AND FLORIDA ASSOCIATION OF INSURANCE AGENTS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal statute that gives a national bank operating in a town with a population not exceeding 5,000 the right to sell insurance (12 U.S.C. § 92) preempts a state law that prohibits such a bank from selling insurance.

2. Whether a state law prohibiting banks from selling insurance is a law enacted "for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

3. Whether 12 U.S.C. § 92 is an "Act [that] specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

LIST OF PARTIES

The names of all parties to the proceeding below appear in the caption of this case.

The petitioner Barnett Bank of Marion County, N.A., is a wholly owned subsidiary of a bank holding company, Barnett Banks, Inc. The petitioner has a subsidiary, Barnett Investment Properties, Inc., which is a bank service corporation that petitioner owns jointly with other Florida-based banking subsidiaries of Barnett Banks, Inc. The parent, Barnett Banks, Inc., has a direct ownership interest in two non-wholly owned subsidiaries: Barnett Bank of Lake Okeechobee (a state bank) and Southeast Switch, Inc. (a regional ATM/EFT network). In addition, Barnett Banks, Inc., through a wholly owned subsidiary, indirectly holds a fifty percent ownership interest in Main America Capital, L.C., a joint venture with MAC Partners.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Barnett Bank of Marion County, N.A., respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 43 F.3d 631 (11th Cir. 1995), and is reproduced at Pet. App. A, *infra*, 1a-16a. The opinion of the United States District Court for the Middle District of Florida (Pet. App. B, *infra*, 17a-36a) is reported at 839 F. Supp. 835. The Court of Appeals' order denying a timely petition for rehearing (Pet. App. C, *infra*, 37a-38a) is unreported. The opinion of the Court of Appeals for the Sixth Circuit that conflicts with the decision in this case (Pet. App. D, *infra*, 39a-64a) is reported at 44 F.3d 388.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on January 30, 1995. A timely petition for rehearing and suggestion for rehearing en banc was denied on March 28, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Supremacy Clause of the United States Constitution (art. VI, cl. 2) provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .

2. 12 U.S.C. § 92, 39 Stat. 753, provides:

> In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: *Provided, however,* That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further,* That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

3. The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), 59 Stat. 34, provides in pertinent part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which

imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . .

4. Florida Statutes Annotated § 626.988 provides in pertinent part:

626.988. Financial institutions; agents and solicitors prohibited from employment; exceptions

(1) For the purpose of this section, the following definitions shall apply:

(a) "Financial institution" means any bank, bank holding company, savings and loan association, savings and loan association holding company, or savings and loan association service corporation or any subsidiary, affiliate, or foundation of any of the foregoing. This definition shall not, however include any financial institution which has been granted an exemption by the Board of Governors of the Federal Reserve System pursuant to s. 4(d) of the federal Bank Holding Company Act of 1956, as amended,[] or any financial institution which neither owns more than 10 percent of the capital stock, nor exercises effective control, of a bank, savings and loan association, or entity licensed under chapter 494 and licensed or authorized to transact business in this state. Specifically excluded from this definition is any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city

having a population of less than 5,000 according to the last preceding census.

(b) "Insurance agency activities" means the procurement of applications for, or the solicitation, negotiation, selling, effectuating, or servicing of, any policy or contract of insurance other than credit life insurance and credit disability insurance.

* * *

(2) No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency.

STATEMENT

In *United States Nat'l Bank of Oregon v. Independent Ins. Agents, Inc.*, 113 S. Ct. 2173 (1993), this Court unanimously held that 12 U.S.C. § 92, enacted in 1916, "remains in force" (113 S. Ct. at 2187) notwithstanding its omission from recent editions of the United States Code. Section 92 states that national banks in small communities (those with populations of 5,000 or less) "may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company."

At least fifteen States [1] have laws purporting to restrict the ability of national banks to sell insurance within the State's borders to the full extent permitted under Section 92. [2] The Eleventh Circuit's decision in this case upholds such a law on the ground that the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1012(b), insulates the local law against a federal preemption challenge. The Sixth Circuit, on the other hand, has very recently held that a similar Kentucky law is preempted by the federal statute and may not be enforced to prevent national banks in small communities in Kentucky from selling insurance. *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994) (reproduced as Pet. App. D, *infra*, 39a-64a).

The Comptroller of the Currency has actively supported the authority of national banks in small towns to

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[1] *See* Conn. Gen. Stat. Ann. § 38a-755 (West 1992 & Supp. 1994); Fla. Stat. Ann. § 626.988(2) (West 1984 & Supp. 1995); Ky. Rev. Stat. Ann. § 287.030 (Michie 1988); La. Rev. Stat. Ann. § 6:121B(2) (West 1954 & Supp. 1995); Me. Rev. Stat. Ann. tit. 24-A, § 1514-A (West 1990 & Supp. 1994); Mass. Ann. Laws ch. 175, § 174E (Law. Co-op. 1987 & Supp. 1995); Nev. Rev. Stat. Ann. § 683A.110 (Michie 1992 & Supp. 1993); N.H. Rev. Stat. Ann. § 384:16-b(II) (1983); N.J. Stat. Ann. § 17:3C-1 (West 1993); Pa. Stat. Ann. tit. 40, § 281(b) (1992); R.I. Gen. Laws §§ 27-3-46, 27-3-47 (1994); Tenn. Code Ann. § 56-6-201 (1994); Tex. Ins. Code. Ann. art. 21.07-3 § 5(h) (West 1993); Vt. Stat. Ann. tit. 8, § 4811 (1993); W. Va Code § 31A-8C-1, 31A-8C-2(f) (1994).

[2] Several other States apparently acknowledge the effect of Section 92 and exempt from a general prohibition any banks in municipalities of 5,000 or less population. *See, e.g.*, Ark. Code Ann. § 23-64-203 (Michie 1994); Colo. Rev. Stat. § 10-2-221(2) (1994); Ga. Code Ann. § 33-3-23(b) (1992); N.M. Stat. Ann. § 59A-12-10 (Michie 1978 & Supp. 1994). *See also*, Miss. Code Ann. § 83-17-229 (1972) (permitting insurance sales by lending institutions located in communities with populations of 7,000 or less).

sell insurance pursuant to 12 U.S.C. § 92. The Comptroller intervened in the *Owensboro* case and participated as a plaintiff in the District Court and as an appellee in the Court of Appeals. The Comptroller also participated in this case by submitting declarations to the District Court in support of the Bank's position and by filing a brief in the Eleventh Circuit as *amicus curiae*, seeking reversal of the District Court's judgment.

We seek a writ of certiorari to resolve the conflict between the Eleventh and the Sixth Circuits and clarify the application of federal law to local laws that limit national banks' activity in the sale of insurance. There are at least twelve States outside the Sixth and Eleventh Circuits in which the validity of such local laws are still undetermined, and if the issue remains unresolved similar laws might, in the future, be enacted in other States.

1. Factual Background

Petitioner Barnett Bank of Marion County ("Barnett Bank" or "the Bank") is a national bank doing business in the State of Florida. The Bank has a branch in Belleview, Florida, a town with a population of 2,666. In 1993, Barnett Bank purchased an insurance agency that had been owned by Ms. Linda Clifford, a licensed Florida insurance agent. Ms. Clifford became an employee of Barnett Bank, with an office located in Belleview. Four days later, the Florida Department of Insurance issued an order pursuant to Fla. Stat. Ann. § 626.988 directing Ms. Clifford and her associates to cease all their insurance agency activities other than the selling of credit life and disability insurance (which the Florida statute permits).

2. District Court Proceedings

Simultaneously with its acquisition of Ms. Clifford's agency, Barnett Bank filed this action against the Insurance Commissioner of the State of Florida and the Florida Department of Insurance in the United States District Court for the Middle District of Florida, seeking a declaratory judgment that 12 U.S.C. § 92 preempted Fla. Stat. Ann. § 626.988, which otherwise would prohibit the Bank or any of its employees from acting as an insurance agent. [3] The District Court had jurisdiction under 28 U.S.C. § 1331. When the Florida Department of Insurance issued its order requiring the Bank's insurance agency to cease operations, the Bank moved for a temporary restraining order and preliminary injunction. The District Court denied the TRO, and consolidated the motion for preliminary injunction with a trial on the merits of the Bank's claims for permanent declaratory and injunctive relief, as well as with the

[3] The Florida statute prohibits financial institutions (including their affiliates and employees) from acting as insurance agents. Financial institutions are defined by the statute to include banks, bank holding companies, and their subsidiaries, affiliates and foundations. Fla. Stat. Ann. § 626.988(1)(a). The statute further provides that "[s]pecifically excluded from this definition is any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000 according to the last preceding census." *Id.* As the District Court stated, this exclusion "[meets] federal section 92 halfway" in that it allows *some* banks — those that are not affiliated with bank holding companies — to operate insurance agencies in towns with populations less than 5,000. Pet. App. B., *infra*, 23a-24a. Barnett Bank, however, was forbidden by the terms of the Florida statute to operate an insurance agency, because it is a subsidiary of a bank holding company, Barnett Banks, Inc.

defendants' counterclaims for a declaratory judgment that the Florida statute was not preempted. [4]

After trial, the District Court denied the motion for a preliminary injunction, and issued a final judgment denying Barnett Bank's requests for permanent injunctive and declaratory relief. The court acknowledged that the Florida statute prohibiting the Bank from operating an insurance agency directly conflicted with 12 U.S.C. § 92. Nonetheless, the court held that the Florida law was saved from preemption by the McCarran-Ferguson Act, which provides that federal law shall not preempt state laws "regulating the business of insurance," unless the federal law in question "specifically relates to the business of insurance." According to the court, the Florida statute prohibiting banks from acting as insurance agents was a law "regulating the business of insurance," but the federal statute permitting banks to act as insurance agents was not a law "specifically relat[ing] to the business of insurance."

3. The Eleventh Circuit's Ruling

Barnett Bank appealed, and the Eleventh Circuit affirmed. Ignoring the contrary decision of the Sixth Circuit in *Owensboro*, the Eleventh Circuit accepted both parts of the District Court's analysis of the application of the McCarran-Ferguson Act. First, purporting to apply a test derived from this Court's decision in *United States Dep't. of Treasury v. Fabe*, 113 S. Ct. 2202 (1993), the court concluded that the Florida statute "regulat[es] the business of insurance" within the meaning of the McCarran-Ferguson Act because the Florida law "was enacted to regulate the

[4] By the time of trial, the state defendants had been joined by various associations of Florida insurance agents, who intervened as defendants and counter-claimants.

relationship between insurers and *potential* policyholders or, more broadly, 'the insurance-purchasing public at large.'" Pet. App. A, *infra*, 11a. The Eleventh Circuit also held that 12 U.S.C. § 92, the federal statute permitting small-town national bank branches to operate insurance agencies, does not "specifically relat[e] to the business of insurance." The court reasoned that in permitting such banks to sell insurance, "Congress was concerned with banking, not insurance." Pet. App. A, *infra*, 15a.

REASONS FOR GRANTING THE WRIT

I

THERE IS A SQUARE CONFLICT OF CIRCUITS ON THE LEGAL ISSUES

This case presents issues on which federal courts of appeals are in direct conflict. The Eleventh Circuit's decision that the McCarran-Ferguson Act immunizes the Florida statute at issue from preemption by 12 U.S.C. § 92 is directly contrary to the result and the reasoning of the Sixth Circuit in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994) (Pet. App. D, *infra*, 39a-64a).

Owensboro concerned a Kentucky statute that, like the Florida statute at issue here, bars certain banks doing business in Kentucky from acting as insurance agents (except with respect to credit life and credit health insurance and real property mortgage insurance). Several national banks with small-town branches had unsuccessfully applied to Kentucky's insurance commissioner for licenses to act as insurance agents. The banks sought declaratory and injunctive relief based on the claim that Section 92 preempted the Kentucky statute. The District Court granted

summary judgment for the plaintiff banks. *Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24, 37 (E.D. Ky. 1992).

The Sixth Circuit affirmed the District Court's judgment. It held that Section 92 preempts the Kentucky statute (Pet. App. D, *infra*, 48a-49a), and specifically rejected the claim that the McCarran-Ferguson Act insulates a contrary state statute. The Sixth Circuit said that the McCarran-Ferguson Act was inapplicable because the state prohibition on banks acting as insurance agents was not "enacted . . . for the purpose of regulating the business of insurance." *See* Pet. App. D, *infra*, 49a.

The Sixth Circuit's decision that the Kentucky statute is not a law "regulating the business of insurance" conflicts with the reasoning of the Eleventh Circuit in this case. The Sixth Circuit noted that "[t]he 'business of insurance' is made up of 'practices' and 'activities' that satisfy the criteria set forth in *Union Labor Life Insurance Co. v. Pireno*; 458 U.S. 119 (1982)." Pet. App. D, *infra*, 46a. These criteria, the Sixth Circuit observed, are:

> *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and insured; and *third*, whether the practice is limited to entities within the insurance industry.

Id. at 46a-47a (quoting *Pireno*, 458 U.S. at 129).

Applying these criteria, the Sixth Circuit concluded that "[e]xcluding a person from participation in an activity, however, is different from regulating the manner in which that activity is conducted. The former is the regulation of

the person; the latter is the regulation of the activity." Pet. App. D, *infra*, 48a. [5]

The Eleventh Circuit, on the other hand, concluded that a prohibition against the sale of insurance by banks "was enacted to regulate the relationship between insurers and *potential* policyholders" and therefore came within the language of the McCarran-Ferguson Act. Pet. App. A, *infra*, 11a. That view of the McCarran-Ferguson language also conflicts with the opinion expressed by the Court of Appeals for the Third Circuit in *United Services Auto. Ass'n v. Muir*, 792 F.2d 356 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). That case held that a state law forbidding banks from selling insurance was not saved from preemption by the McCarran-Ferguson Act, because the state law "has no part in the business of insurance under McCarran-Ferguson." *Id.* at 364.

II

THE LEGAL PRINCIPLES ARE IMPORTANT AND SHOULD BE APPLIED UNIFORMLY ACROSS THE COUNTRY

The conflict between the Sixth and Eleventh Circuits has important consequences. As matters now stand, national banks with small-town branches in the four States of the Sixth Circuit (and, most likely, the three States of the Third Circuit) may operate insurance agencies through those branches, as permitted by federal law, without concern that

[5] Once it concluded that the Kentucky statute did not regulate the business of insurance within the meaning of the McCarran-Ferguson Act, the Sixth Circuit did not reach the question whether 12 U.S.C. § 92 "specifically relates to the business of insurance." Pet. App. D, *infra*, 49a.

state regulators may shut them down under local statutes protecting the insurance agents' industry. [6] National banks in Florida, Alabama and Georgia, by contrast, may not exercise their federally granted powers in this area if state law prohibits their sale of insurance. [7]

The conflict creates national uncertainty. Approximately a dozen States in other Circuits have laws in force that, on their face, conflict with 12 U.S.C. § 92. The validity of these laws will remain in question, and the freedom of national banks to engage in activities permitted by Section 92 will remain under a cloud of uncertainty, until this Court resolves the legal issues. Litigation in one of these States — Louisiana — has reached the appellate level, and the Supreme Court of Louisiana will soon be forced to choose sides in the conflict. *See First Advantage Ins., Inc. v. Green*, No. 94 CA 0813 (La. Ct. App. Mar. 3, 1995), *application for writ of certiorari or review pending*, No. 95-C-0820 (La. 1995). And the Eleventh Circuit's decision may well prompt other States to enact legislation limiting insurance agency activities by banks, thereby widening the field of conflict.

Resolution of this uncertainty is of great practical importance to banks and insurance agents. There has been extensive litigation in the past decade over the question whether banks may sell insurance, and this reflects the

[6] Such statutes exist in Kentucky, Tennessee, Pennsylvania and New Jersey.

[7] Of the three States in the Eleventh Circuit, only Florida currently has a statute that directly conflicts with 12 U.S.C. § 92. Under the Eleventh Circuit's ruling, however, the legislatures of Alabama and Georgia may impose such a restriction if they are persuaded to do so by competing interest groups.

significant economic consequences this issue has for the industries involved. *See generally Nations Bank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S.Ct. 810 (1995); *United States Nat'l Bank of Oregon v. Independent Ins. Agents, Inc.*, 113 S. Ct. 2173 (1993); *Variable Annuity Life Ins. Co. v. Clark*, 13 F.3d 833 (5th Cir. 1994); *Independent Ins. Agents of Am. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993); *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993); *Citicorp v. Board of Governors*, 936 F.2d 66 (2d Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992); *Independent Ins. Agents, Inc. v. Board of Governors*, 890 F.2d 1275 (2d Cir. 1989), *cert. denied*, 498 U.S. 810 (1990); *National Ass'n of Casualty & Surety Agents v. Board of Governors*, 856 F.2d 282 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1090 (1989); *Independent Ins. Agents, Inc. v. Board of Governors*, 835 F.2d 1452 (D.C. Cir. 1987); *Independent Ins. Agents, Inc. v. Board of Governors*, 736 F.2d 468 (8th Cir. 1984); *First Nat'l Bank v. Smith*, 610 F.2d 1258 (5th Cir. 1980).

III

THE COMPTROLLER OF THE CURRENCY HAS ACTIVELY SUPPORTED THE PETITIONER'S POSITION IN FEDERAL LITIGATION

The importance of the legal issues is underscored by the active participation of the Executive Branch of the federal government in this case and in the *Owensboro* case. The Comptroller of the Currency, represented by the Civil Division of the Department of Justice, challenged the Kentucky and Florida laws at issue in these cases. Noting that the Comptroller of the Currency "has an obvious interest in assuring that national banks are able to exercise the powers granted to them by Congress," the United States

participated as *amicus curiae* in support of petitioner in the Eleventh Circuit in this case. Brief for the Comptroller of the Currency of the United States as *Amicus Curiae* at 2, *Barnett Bank of Marion County, N.A. v. Gallagher*, 43 F.3d 631 (11th Cir. 1995) (No. 93-3508). The Justice Department argued that the Florida statute was not enacted "for the purpose of regulating the business of insurance" within the meaning of McCarran-Ferguson because "the aim of the Florida statute is not to adjust, manage or control the insurance business, but to regulate the powers of financial institutions, including banks." *Id.* at 18. The United States further asserted that 12 U.S.C. § 92 "specifically relates" to the business of insurance under the McCarran Ferguson Act since it "describes — in indisputably specific terms — the insurance agency activities in which certain national banks may engage." *Id.* at 22.

In *Owensboro*, the United States intervened to support the plaintiff banks and, as it did in this case, voiced concern about the impact of the state law on the ability of national banks to conduct business activities specifically authorized by Congress. Arguing that Kentucky's statute was preempted by 12 U.S.C. § 92, the Department of Justice contended that

> [i]t is simply unreasonable to conclude that the McCarran-Ferguson Act, which was primarily intended to restore to the states the "power to regulate or tax the business of insurance" . . . H.Rep. No. 143, 79th Cong., 1st Sess. 3 (1945) . . . has the effect of intruding upon the longstanding and traditional federal governance of national banks.

Brief of the Appellee United States at 29, *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994) (Nos. 92-6330, 92-6331).

The United States' participation in the resolution of these legal issues by the Courts of Appeals manifests the important national interests at stake. Although the government did not formally intervene in this case, it made its position clear to both the District Court and the Eleventh Circuit.

IV

THE ELEVENTH CIRCUIT'S DECISION IS ERRONEOUS

Given the square Circuit conflict on the applicable legal issues, we will not here belabor the merits of the case. However, even a brief review of the Eleventh Circuit's decision shows it to be dubious. In holding that the Florida statute — which simply excludes certain banks from acting as insurance agents — is for the "purpose of regulating the business of insurance," the Eleventh Circuit adopted a particularly expansive view of both the "business of insurance" and of what it means to "regulate" that business. By contrast, it adopted an exceedingly narrow definition of both the "business of insurance" and what it means for a statute to "relate" to that business under the second prong of its preemption analysis under the McCarran-Ferguson Act, thereby arriving at the curious holding that a statute that specifically authorizes a national bank to sell insurance does not "relate" to the business of insurance.

The two halves of the Eleventh Circuit's analysis manifestly do not fit together. The category of statutes that "regulate" the business of insurance should, by any ordinary

standards of construction, be *narrower* than that of statutes that "relate" to that business. If a statute that says a bank may *not* sell insurance *regulates* the business of insurance, it necessarily follows that a statute that specifically says a bank *may* sell insurance specifically *relates* to the business of insurance. One of the two parts of the Eleventh Circuit's analysis must be wrong. And if either part is wrong, the Eleventh Circuit's conclusion that the Florida statute is not preempted cannot stand.

V

THIS CASE IS THE MORE APPROPRIATE VEHICLE FOR DECISION OF THE LEGAL ISSUES

Because the conflict between the Eleventh Circuit's decision below and the Sixth Circuit's *Owensboro* ruling is so direct, it is likely that this Court will receive petitions for writs of certiorari seeking review of both decisions. We respectfully suggest that this case is the appropriate one in which to address the issues.

First, this case presents the issue in a particularly concrete setting: Barnett Bank has purchased an insurance agency and employs a licensed agent ready to carry on the business as soon as Florida's statutory prohibition on that activity is declared preempted. The same cannot be said of the facts in Kentucky, where the litigation was initiated at a much less ripe state. *Second*, the Eleventh Circuit's decision addresses both halves of the McCarran-Ferguson Act analysis, and thus frames both issues for this Court's review. *Finally*, the decision of the Eleventh Circuit is incorrect and, unlike that of the Sixth Circuit, merits reversal by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 1995

APPENDIX

APPENDIX A
43 F.3d 631

BARNETT BANK OF MARION COUNTY, N.A.,
a national banking association, Plaintiff-Counter-Defendant, Appellant, Cross-Appellee,

v.

Tom GALLAGHER, Insurance Commissioner
of the State of Florida, Fla. Dept. Insurance, a state agency, Defendants-Appellees, Cross-Appellant,

Florida Association of Life Underwriters,
Professional Insurance Agents of Florida, Inc., Florida Associations of Insurance Agents, Defendants-Counter-Claimant, Appellees-Cross-Appellants.

No. 93-3508

United States Court of Appeals,
Eleventh Circuit

Jan. 30, 1995.

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Appeals from the United States District Court for the Middle District of Florida.

Before COX, Circuit Judge, FAY, Senior Circuit Judge, and CARNES *, District Judge.

FAY, Senior Circuit Judge:

This appeal arises from a final order following a bench trial on the merits of plaintiff Barnett Bank of Marion County's ("Barnett Marion") suit for permanent injunctive and declaratory relief against Florida Insurance Commissioner Tom Gallagher and the Florida Department of Insurance. The Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc., and the Florida Associations of Insurance Agents intervened in the district court. Appellant Barnett Marion alleges the district court erred in concluding that Fla. Stat. ch. 626.988 regulates insurance, and in concluding that 12 U.S.C. § 92

* Honorable Julie E. Carnes, U.S. District Judge for the Northern District of Georgia, sitting by designation.

("section 92") does not relate to insurance. [1] We disagree, and AFFIRM the district court judgment.

Appellee/Cross-Appellants Tom Gallagher and the Florida Department of Insurance allege the district court erred in holding section 92 permits national banks to sell insurance nationwide. Appellee/Cross-Appellants Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc., and the Florida Associations of Insurance Agents allege the district court erred in finding that Appellant Barnett Marion was "located and doing business in a place with a population of less than 5000" pursuant to section 92. Based on our reading of the Federal and Florida statutes, we find it unnecessary to reach either of these issues.

I. BACKGROUND

Florida law precludes bank subsidiaries or bank holding company affiliates from conducting insurance activities in Florida. Fla. Stat. ch. 626.988 (1993). Federal law, however, allows national banks—despite their status as subsidiaries or affiliates—to act as insurance agents in localities with fewer than five thousand people. 12 U.S.C. § 92 (1988).

[1] Recently the United States Supreme Court resolved a conflict among the Circuit Courts of Appeals by holding that section 92 properly is included in § 13 of the Federal Reserve Act (Act Dec. 23, 1913, ch. 6) rather than the National Bank Act. *See United States Nat'l Bank of Or. v. Indep. Ins. Agents*, ___ U.S. ___, ___, 113 S. Ct. 2173, 2182-86, 124 L. Ed. 2d 402 (1993). Both the parties and the district court at various times refer to the section as part of the National Bank Act. While this nomenclature does not affect the section's validity in light of the Supreme Court case, for clarity's sake this Court will refer to the statute simply as "section 92."

Barnett Marion is a national-bank subsidiary of a bank holding company, Barnett Banks, Inc. Barnett Marion's principal place of business is Ocala, Florida, but it maintains a branch office in Belleview, Florida. Belleview's population is fewer than five thousand, as shown by the last decennial census. Barnett purchased an insurance agency from Linda K. Clifford in Belleview. As a result, Ms. Clifford, a Florida licensed insurance agent, became an employee of Barnett Marion and maintained her office inside the bank.

The day of the purchase, Barnett Marion sought a declaration allowing it to use this branch office to "market insurance to existing and potential customers regardless of where the insurance customers are located." Barnett Marion argued that 12 U.S.C. § 92 preempted Fla. Stat. ch. 626.988, and asked the district court to find that:

> Barnett Bank and, specifically Barnett Bank Belleview, is authorized and empowered by federal law to act as an agent for any insurance company authorized by the State of Florida to do business in Florida.

(R1-1-7).

Four days later, the Florida Department of Insurance ("Department") issued an Immediate Final Order ("IFO") directing Linda Clifford and her associate agents to cease insurance agency activities other than selling credit life and credit disability insurance. Barnett Marion moved for a temporary restraining order ("TRO") and sought to enjoin the Department from acting on the IFO.

The district court denied Barnett Marion's motion for TRO and held a hearing on the motion for preliminary

injunction. The court denied the motion for the preliminary injunction and set the case for trial.

The issues before this court are as follow: First, whether Fla. Stat. ch. 626.988 regulates insurance. Second, whether 12 U.S.C. § 92 relates to insurance. Third, whether Barnett Marion is located and doing business in a place with fewer than five thousand people, and if so, whether the bank may sell insurance nationally or only within this small town. To answer these questions of law we must examine the history and purposes of these statutes.

II. JURISDICTION

Upon the Court's request at oral argument, each side briefed the issue of whether the district court had subject matter jurisdiction to decide the case. Based on *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 259 n. 6, 105 S. Ct. 695, 697 n. 6, 83 L. Ed. 2d 635 (1985) and *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96 n. 14, 103 S. Ct. 2890, 2899 n. 14, 77 L. Ed. 2d 490 (1983), we find subject matter jurisdiction. The United States Supreme Court specified in *Shaw* that:

> The Court's decision today in *Franchise Tax Board v. Construction Laborers Vacation Trust, ante*, [463 U.S.] p. 1, [103 S.Ct. 2841, 77 L. Ed. 2d 420] (1983) does not call into question the lower courts' jurisdiction to decide these cases. *Franchise Tax Board* was an action seeking a declaration that state laws were *not* pre-empted by ERISA. Here, in contrast, companies subject to ERISA regulation seek injunctions against enforcement of state laws they claim *are* pre-empted by ERISA, as well as declarations that those laws are pre-empted.

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See *Ex parte Young*, 209 U.S. 123, 160-162 [28 S.Ct. 441, 454-55, 52 L. Ed. 714] (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Id. at 96, n. 14, 103 S.Ct. at 2899, n. 14.

In accord with Supreme Court case law, we hold that a federal court has federal question jurisdiction to decide a claim against a state officer or agency alleging that a federal statute preempts a state statute under the Supremacy Clause and that the state statute cannot be enforced. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

III. STANDARD OF REVIEW

This appeal requires review of the district court's statutory interpretation. Such review is *de novo*. *Centel Cable Television Co. of Fla. v. Thomas J. White Dev. Corp.*, 902 F.2d 905, 908 (11th Cir. 1990); *Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225, 1227 (11th Cir. 1990). We review the district court's fact findings in a bench trial for clear error. Fed. R. Civ. P. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985).

IV. ANALYSIS

A. Findings of Fact

While the parties dispute whether the trial court made findings of fact or merely conclusions of law, none of the parties alleges the trial court erred in its fact-finding. Appellant Barnett Marion's Initial Brief at 16; Appellee Gallagher's Initial Brief at 13; Appellee Underwriter's Initial Brief at 12. Accordingly, we review *de novo* the trial court's conclusions of law.

B. Conclusions of Law.

1. McCarran—Ferguson

In the late 19th Century, the United States Supreme Court held insurance contracts were not in interstate commerce. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183, 19 L. Ed. 357 (1868). The states then developed extensive insurance regulations. In 1944, the Supreme Court rejected that analysis in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944), holding Congress could regulate insurance under its Commerce Clause power. *Id.* at 553, 64 S. Ct. at 1173-74.

In response, Congress passed the McCarran-Ferguson Act, which proclaimed that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, *unless such Act specifically relates to the business of insurance*." 59 Stat. 34 (1945), 15 U.S.C. § 1012(b) (emphasis added). This statutory scheme creates a reverse-preemption doctrine for insurance legislation. That is, a state statute that regulates insurance presumptively preempts

a contrary Congressional statute unless the Congressional statute specifically relates to insurance. Congress declared this state regulation to be in "the public interest." 15 U.S.C. § 1011.

With McCarran-Ferguson guiding our analysis, this Court first must ask whether Fla. Stat. ch. 626.988 *regulates* insurance, so as to presumptively preempt contrary federal law. Second, we must ask whether section 92 *specifically relates* to insurance, so that it will fit within the McCarran-Ferguson exception that reinstates federal law as supreme.

2. Florida Law

The state statute at issue, Fla. Stat. ch. 626.988, is part of the Unfair Insurance Trade Practices Act (Part X), located within the Florida Insurance Code. Florida Statute chapter 626.951 declares that:

> The purpose of this part [X] is to regulate trade practices relating to the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Pub. L. No. 15, 79th Congress) [McCarran-Ferguson], by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

To this end, Fla. Stat. ch. 626.988 provides, in relevant part:

> (2) No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency.

Fla. Stat. ch. 626.988(2). Subsection (1)(a) defines a "financial institution" to include any bank or bank holding company, or any subsidiary, affiliate, or foundation thereof. "Specifically excluded from this definition is any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000 according to the last preceding census." *Id.* Barnett Marion's status as a national-bank subsidiary removes it from this narrow exception and prohibits it from engaging in insurance activities under the Florida statute.

At first blush, it seems evident that a statutory chapter entitled "Insurance Field Representatives and Operations," Fla. Stat. ch. 626, and a statutory part entitled "Unfair Insurance Trade Practices," Fla. Stat. ch. 626, part X, must regulate insurance. The Supreme Court, however, has cautioned that location informs but does not determine whether a statute regulates "the business of insurance." *United States Dept. of Treasury v. Fabe*, ___ U.S. ___, ___, 113 S. Ct. 2202, 2210, 124 L. Ed. 2d 449 (1993). More important, held the Court, is whether the statute's aim is to regulate "an essential part of the 'business of insurance.'" *Id.*

In *Fabe*, the Supreme Court held that an Ohio statute that accorded policyholders priority over an insolvent insurance company's other creditors *was* a law enacted to regulate the business of insurance because it regulated policyholders and their relationship to the insurance company. *Id.* at ___, 113 S. Ct. at 2212. Under McCarran-Ferguson, this portion of the Ohio statute preempted a contrary federal statute giving the United States priority over other creditors of a bankrupt. *See id.* The Supreme Court in *Fabe* took this "relationship" test directly from *S.E.C. v. Nat'l Sec., Inc.*, 393 U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969), which involved an Arizona statute designed to protect insurance companies' *share*holders. In finding that the Arizona statute was not enacted to regulate the *business* of insurance, the Court held:

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance" [as used within McCarran-Ferguson.] Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the *relationship between the insurance company and the policyholder*. Statutes aimed at protecting or regulating this relationship, *directly or indirectly*, are laws regulating the "business of insurance."

Id. at 460, 89 S. Ct. at 568-69 (emphasis added).

The question we now ask is whether the Florida statute meets this test because it was enacted to protect policyholders by regulating their relationship with the insurer. In the instant case, the trial court relied on state court interpretations of the Florida statute and testimony from the Director of Legal Services for the Florida Department of Insurance to hold that Fla. Stat. ch. 626.988 was enacted to regulate the relationship between insurers and *potential* policyholders or, more broadly, "the insurance-purchasing public at large." (R3-69-12). Specifically, the Florida cases relied on express a concern underlying the statute with overreaching by financial institutions if permitted to sell insurance. The Florida First District Court of Appeals has spoken at least twice on the subject, finding that:

> [b]ecause the statute concerns the regulation of insurance, it is a matter within the state's exercise of police power and large discretion is vested in the legislature . . . . Concerns regarding financial institutions' entry into insurance activities, including the prevention of coercion, unfair trade practices, and undue concentration of resources, existed at the time of passage of the statute and remain valid today . . . [A] *legislature could well have decided* that some protection was required.

Glendale Fed. S & L. Ass'n v. Fla. Dept. of Ins., 587 So.2d 534, 536 n.1 and 537 (Fla. 1st Dist. Ct. App. 1991)(citations omitted), *rev. denied*, 599 So.2d 656 (Fla. 1992).

> [Moreover,] insurance is an industry affected with a public interest and subject to regulation by the States. The Legislature has determined

> that there is potential for abuse inherent in financial institutions being involved in the sale of insurance, and that the licensing of employees of financial institutions as insurance agents is not in the public interest.

Prod. Credit Ass'ns of Fla. v. Fla. Dept. of Ins., 356 So.2d 31, 32 (Fla. 1st Dist. Ct. App. 1978).

At trial, the Director of Legal Services for the Florida Department of Insurance, Mr. Shropshire, testified about the need to protect policyholders by regulating the financial stability of insurance companies so that they remain solvent and able to pay claims upon demand, which could be threatened by pressures to make improper insurance decisions. This pressure could force an insurer to assume a bad risk to quickly consummate a bank loan, or could push a bank customer to take out unnecessary insurance where the bank's only motive is profit. While appellant Barnett Marion argues that the statute exists only to protect "independent insurance agents from competition by financial institutions," Appellant's Brief at 35, we disagree. The danger in these situations, as the trial court correctly points out, is the loss of arms-length transactions and objectivity when the bank becomes involved with insurer and insured. "The maintenance of this relationship is for the protection of the solvency of the insurance industry, and the prevention of coercion, which in turn protects all potential, present and future policyholders." (R3-69-16).

Relying on the state court interpretations, testimony at trial, reference in the Florida statute to McCarran-Ferguson, and explicit instruction from the United States Supreme Court in *Nat'l Securities* that regulatory protection of policyholders may be indirect, 393 U.S. at 460, 89 S. Ct. at 568-69, the trial court found that Fla. Stat. ch. 626.988

regulates the business of insurance because it protects policyholders. We agree. "Under the terms of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), therefore, federal law must yield to the extent the [state] statute furthers the interests of policyholders." *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2208.

3. Section 92

"State laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2211. The question now is whether section 92 specifically requires otherwise. To answer this question, we examine the section's history.

In 1863, the Civil War Congress enacted the National Bank Act, which it then reenacted in 1864. The Act created federally chartered national banks and empowered them to issue and accept a uniform national currency. One section of the National Bank Act limited the indebtedness of national banks. In 1874, Congress revised, reorganized, and reenacted all statutes in effect at the time, including this indebtedness provision, and simultaneously repealed all prior statutes. With minor stylistic changes, Title 62 of the Revised Statutes § 5202 contained the National Bank Act's indebtedness provision.

In 1913, Congress amended Rev. Stat. § 5202 to include a fifth exception to the indebtedness provision. The amendment was a detail of the Federal Reserve Act of 1913, which created Federal Reserve banks and the Federal Reserve Board, and required national banks to become members of the new Federal Reserve System. Finally, in 1916, Congress enacted what we today call section 92. One

portion of section 92 authorized national banks located and doing business in places with fewer than five thousand inhabitants, as shown by the last preceding decennial census, to be agents for any fire, life, or other insurance company authorized to do business in the State where the bank is located.

Two years later, however, Congress repealed all of § 5202 except the indebtedness provision. The story, however, does not end here. In 1982, Congress actually amended section 92. See Garn-St. Germain Depository Institutions Act of 1982, § 403(b), 96 Stat. 1511; see also Competitive Equality Banking Act of 1987, § 201(b)(5), 101 Stat. 583 (imposing a one-year moratorium on section 92 activities). Amid confusion over whether section 92 still lived, the Supreme Court tackled the issue in *United States Nat'l Bank of Or. v. Indep. Ins. Agents*, ___ U.S. ___, 113 S. Ct. 2173, 124 L. Ed. 2d 402 (1993). Finding the apparent repeal of section 92 to have been mere scrivener's error in placing section 92 in the Rev. Stat. § 5202 rather than the Federal Reserve Act, as the Court divined Congress had intended, the Supreme Court held section 92 had escaped repeal. [2]

Although *Nat'l Bank of Or.* did not address whether section 92 relates to insurance, it did emphasize at length the relation between section 92 and both the National Bank Act and the Federal Reserve Act, neither of which suggests section 92 relates specifically to insurance or was a specific attempt to preempt state insurance laws. Both Acts concern

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[2] All of the above history of section 92 and the National Bank Act is taken in compacted form from *Nat'l Bank of Or.*, ___ U.S. ___, 113 S. Ct. 2173 (1993). For a more detailed discussion replete with citations and authorities, see Justice Souter's opinion for a unanimous Court, *id.* at ___-___, 113 S. Ct. at 2179-82.

banking, not insurance. Moreover, Congress enacted section 92 "at a time when the business of insurance was believed to be beyond the reach of Congress' power under the Commerce Clause." *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2212. As the trial court pointed out, "[e]ven *South-Eastern Underwriters*, which briefly altered the preemption landscape, noted that prior to 1944 Congress 'at no time' had attempted to control the business of insurance." (R3-69-18)(citing 322 U.S. at 544, 64 S. Ct. at 1168-69). Before 1944, both Congress and the Supreme Court understood *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183, 19 L. Ed. 357 (1868), to place insurance outside the Commerce Clause power. Accordingly, when Congress enacted section 92 in 1916—nearly 30 years before *South-Eastern Underwriters*—Congress could not have been attempting to regulate a business that it believed it had no power to regulate. Congress was concerned with banking, not insurance.

This Court concludes that section 92 neither "specifically relates to the business of insurance," 15 U.S.C. § 1012(b), nor "specifically requires," *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2211, that apparently conflicting state laws be preempted. Accordingly, under McCarran-Ferguson, Fla. Stat. ch. 626.988 need not yield to section 92. Based on this determination that Fla. Stat. ch. 626.988 may proscribe national-bank subsidiaries from conducting insurance activities within Florida, we do not reach the issues of whether, if such banks could sell insurance, they could do it nationally.

V. CONCLUSION

We hold that the district court correctly interpreted both the federal and state statutes at issue in this case.

Further, we hold that the district court's findings of fact were not clear error. We AFFIRM.

AFFIRMED.

APPENDIX B
839 F. Supp. 835

BARNETT BANK OF MARION COUNTY, N.A., a national banking association, Plaintiff,

v.

The Honorable Tom GALLAGHER, Insurance Commissioner of the State of Florida; The Florida Department of Insurance, a state agency; Florida Association of Life Underwriters; Professional Insurance Agents of Florida, Inc.; and Florida Association of Insurance Agents, Defendants.

No. 93-178-Civ-Oc-20.

United States District Court,
M.D. Florida,
Ocala Division.

Dec. 3, 1993.

David M. Wells, Mahoney, Adams & Criser, Jacksonville, FL, for plaintiff.

Robert Prentiss, Office of Legal Affairs, David J. Busch, Law Office of David J. Busch, Tallahassee, FL, for Tom Gallagher.

Don Dowdell, Daniel Y. Sumner, Robert Prentiss, Office of Legal Affairs, David J. Busch, Law Office of David J. Busch, Tallassee, FL, for Florida Dept. of Ins.

J. Robert McClure, Jr. Carlton, Fields, Ward, Emmanuel, Smith & Cutler, PA, Tampa FL, Ann M. Kappler, Arti K. Rai, Jenner & Block, Washington, DC, for Florida Ass'n of Life Underwriters, Professional Ins. Agents of Florida, Inc., and Florida Ass'n of Ins. Agents.

OPINION and ORDER

SCHLESINGER, District Judge.

This cause came before the Court on November 19, 1993 on Plaintiff's Motion for a Preliminary Injunction (Doc. No. 4, filed October 25, 1993) and Plaintiff's Renewed Motion filed on November 4, 1993 (Doc. No. 24), consolidated, pursuant to Rule 65(a)(2), Fed. R. Civ. P., with a trial on the merits of the requested declaratory relief.

INTRODUCTION

Plaintiff filed this action for permanent injunctive and declaratory relief on October 18, 1993 asking the Court "to construe the National Bank Act, 12 U.S.C. § [21, *et seq.*], and its preemptive effect on State regulation of federally chartered banking associations." Complaint at ¶ 1. While Fla. Stat. ch. 626.988 precludes bank subsidiaries from engaging in insurance activities in the state of Florida, 12 U.S.C. § 92 ("section 92") allows national banks—presumably without regard to their status as subsidiaries or affiliates—to act as insurance agents in localities where the population is less than 5,000. Accordingly, Plaintiff asserts, the Court should declare, inter alia, that the state statute is preempted by the federal one, and that Plaintiff is allowed to act as an insurance agent for any Florida-authorized insurance company.

On October 22, 1993, Defendant Gallagher issued an Immediate Final Order to Cease and Desist to Linda K. Clifford and Linda Clifford Insurance, Inc. ("LCI"), an insurance agency purchased by Plaintiff on October 18, 1993. Defendant Gallagher ordered Clifford and LCI, in light of their current association with Plaintiff, to cease and desist from any and all insurance agency activity other than credit life insurance and credit disability insurance.

On October 25, 1993, Plaintiff filed a Motion seeking immediate injunctive relief in the form of either a Temporary Restraining Order ("TRO") or a Preliminary Injunction. The Court found that Plaintiff failed to demonstrate that the alleged injury was "*so imminent* that notice and a hearing on the application for preliminary injunction is impractical if not impossible." Local Rule 4.05(b)(2). Accordingly, that portion of the Motion seeking a TRO was denied.

The Court heard argument on the Motion for a Preliminary Injunction on October 27, 1993, left intact its prior ruling on the TRO, and set the matter for a consolidated trial and hearing on the Motion for Preliminary Injunction.

Defendants have counterclaimed against Plaintiff, asking the Court for the *opposite* declaratory relief, namely, that section 92 *prohibits* Plaintiff from, inter alia, soliciting insurance or acting as an agent for others soliciting insurance in such localities.

Having presided over the trial in this matter, and having considered the entire record, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff, a subsidiary of the bank holding company Barnett Banks, Inc., is a national banking association organized and existing under the National Bank Act, 12 U.S.C. § 21, et seq. Plaintiff maintains its principal place of business in Ocala, Florida, and engages in the business of banking there and elsewhere within Marion County, Florida. Plaintiff owns and operates a branch bank located in Belleview, Florida, the population of which, according to the last decennial census, is less than 5,000.

Prior to October 18, 1993, LCI operated from Belleview as a general lines agent for insurance companies authorized to do business in Florida. On that date, Plaintiff purchased certain of LCI's assets, including its name, and LCI's employees became employees of Plaintiff. The decision to purchase the assets of LCI was made by Plaintiff, based upon the recommendation of the Executive Committee of Barnett Banks, Inc., which is the largest bank holding company headquartered in Florida and one of the largest in the southeastern United States.

Plaintiff has stated that all insurance sales made through the insurance division of Barnett Belleview are made from the office in Belleview through Linda Clifford or licensed agents acting under her supervision. Linda Clifford is licensed in the state of Florida as life, health and general lines insurance agent, and is subject to the jurisdiction and regulation of Defendant Florida Department of Insurance ("DOI") pursuant to Chapters 624 and 626, Florida Statutes. Linda Clifford has insurance customers both inside and outside of incorporated Belleview. The Belleview branch of

Plaintiff has banking customers inside and outside of incorporated Belleview.

With respect to all insurance sales conducted by the insurance division of its Belleview branch, Plaintiff's stated intent is that such insurance will be marketed to existing and potential customers regardless of where they are located, subject only to the requirements that (1) such sales be conducted only on behalf of insurance companies licensed to [do] business in Florida and (2) such insurance not be sold from bank branches in towns whose population is in excess of 5,000.

On its face, section 626.988 purports to prevent the insurance agency activities of the Plaintiff's Belleview branch.

Section 92

As enacted in 1916, section 92 of the Federal Reserve Act [1] provides that

> any [national banking] association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as agent for any . . . insurance company authorized by the

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[1] Although the parties—and the Court in at least one prior Order — have referred to section 92 as being part of the National Bank Act, the Supreme Court, as discussed *infra*, has deemed the statute instead to be part of the Federal Reserve Act. *See U.S. Nat'l Bank of Or. v. Independent Ins. Agents*, ___ U.S. ___, ___, 113 S. Ct. 2173, 2185, 124 L. Ed. 2d 402 (1993).

> authorities of the State in which said bank is located to do business in said State . . .

12 U.S.C. § 92. In 1963 the Comptroler issued a ruling that this section allows a branch of a national bank located in a community the population of which is 5,000 or less to sell insurance, even though the principal office of that bank may be in a community whose population *exceeds* 5,000. This policy presently is codified at 12 C.F.R. § 7.7100 (1993). The fact that 12 U.S.C. § 92 presently does not appear in the United States Code, and has not for some time, led at least two circuits to opposite conclusions regarding whether or not the section actually continued to exist. However, the Supreme Court recently resolved this inter-circuit conflict, stating that a 1918 amendment neither repealed nor affected section 92, *which section remains current law. See Nat'l Bank of Or.*, ___ U.S. at ___-___, 113 S. Ct. at 2182-86.

Accordingly, there is no question that section 92 remains the law of the land. Moreover, this section places no limitations on the geographic scope of insurance sales authorized thereunder. *See Independent Ins. Agents v. Ludwig*, 997 F.2d 958, 961 (D.C. Cir. 1993). Thus, provided that the bank is selling the insurance *from* a community of fewer than 5,000 inhabitants, there are no limits as *to where* the insurance may be sold. However, Defendant Gallagher, while accepting that proposition, also appears to ask the Court to read into section 92 a further requirement that such banks' activities *be confined* to such localities. The Court finds no such restriction within the language of section 92. Thus, even if it is true that, as alleged by Defendant, only 35% of Plaintiff's business is located in Belleview, that fact would not deprive Plaintiff of

standing to assert that its activities should be deemed permissible under that statute. [2]

Nevertheless, while *Ludwig* is highly instructive, it involved no state scheme alleged to contravene section 92, as does the case at bar. There was no patent federal-state conflict in *Ludwig*, and thus it did not present the preemption issues such as presently are before the Court.

Florida statute 626.988

Section 626.988 of the Florida statutes provides, in relevant part:

> (2) No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency.

Fla. Stat. ch. 626.988(2). The statute defines a "financial institution" as, inter alia, any bank or bank holding company, or any subsidiary, affiliate, or foundation thereof. *Id.* at 626.988(1)(a). However, "specifically excluded" from this definition is a bank which is *not* a subsidiary or affiliate of a bank holding company and which is located in a city having a population of less than 5,000. *Id.* Thus, the legislature met federal section 92 halfway: banks in such communities are allowed under Florida law to sell insurance,

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[2] Accordingly, the Court is not required to make any factual finding concerning the percentage of Plaintiff's business that is located in Belleview.

but only if they are not subsidiaries or affiliates of a (larger) bank holding company.

As stated above, Plaintiff Barnett Marion is a subsidiary of the bank holding company Barnett Banks, Inc. Plaintiff's principal place of business is Ocala, Florida. Included among Plaintiff's business is the operation of a branch bank in Belleview, Florida, a town with a population of less than 5,000. Accordingly, Plaintiff asserts that it is authorized to engage in Belleview in insurance agency activities. Plaintiff asserts that the Florida statute is in direct conflict with section 92. Therefore, Plaintiff argues, this Court should render a declaration that the Florida provision is preempted by section 92, and that Plaintiff is allowed to engage in insurance activities.

Defendants contend in opposition that the Florida statute is a law regulating the business of insurance, that section 92 is not such a law and, therefore, that the McCarran-Ferguson Act, 15 U.S.C. § 1011, et seq. ("McCarran-Ferguson" or "the Act"), *infra*, saves section 626.988 from preemption.

The Court notes that this is a particularly "close" case. The questions presented are not particularly susceptible to easy resolution, especially in light of the dearth of precedent in this area. Nevertheless, the disposition of the matter may be simplified as follows: For Plaintiffs to prevail, the Court must find that section 92 is a "bank" law; that section 626.988 is a "bank" law; and, therefore, that the Florida provision, as inconsistent with federal law, is preempted and superseded by section 92. For Defendants to prevail, the Court must find that section 626.988 is a law enacted for the purpose of regulating the business of insurance; that section 92 does not specifically relate to the business of insurance; and, therefore, that

McCarran-Ferguson exempts section 626.988 from any preemption, thus allowing 626.988 to remain effective, even with the continued existence of section 92. [3]

Preemption and McCarran-Ferguson

In relevant part, the McCarran-Ferguson Act states:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the Purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b). The Act was passed by Congress in 1945 as an immediate response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944). Noting that the "modern insurance business holds a commanding position in the trade and commerce of our Nation," *id.* at 539, 64 S. Ct. at 1166, the Court there had held, for the first time, that insurance activity conducted across state lines was subject to the regulatory power of Congress under the Commerce Clause, in particular, the antitrust laws, *id.* at 562, 64 S. Ct. at 1178. By subsequently enacting McCarran-Ferguson, Congress "attempt[ed] to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain in *state* regulation." *SEC v.*

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[3] In the alternative, Plaintiff could prevail under a McCarran-Ferguson analysis if the Court found that section 92 was specifically related to the business of insurance, and if 626.988 is deemed to be a law enacted for the purpose of regulating insurance. However, Plaintiff has consistently stated and/or conceded that section 92 is a "bank" law, and has premised its arguments accordingly.

National Securities, Inc., 393 U.S. 453, 459, 89 S. Ct. 564, 568, 21 L. Ed. 2d 668 (1969) (emphasis supplied).

The declaration-of-intent section of McCarran-Ferguson is particularly notable, wherein Congress stated that "the continued regulation and taxation by the several states of the business of insurance is in the public interest." 15 U.S.C. § 1011. Congress' purpose was to provide "support to the existing *and future* state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429, 66 S. Ct. 1142, 1155, 90 L. Ed. 1342 (1946) (emphasis supplied). Thus, while within the previous year the Supreme Court had stated that "[w]e cannot make an exception of the business of insurance," *South-Eastern Underwriters*, 322 U.S. at 553, 64 S. Ct. at 1173, Congress' response, emphatically, was that it most certainly could.

Under McCarran-Ferguson, then, the Court's initial inquiry must be to determine whether section 626.988 is a law enacted by the state of Florida "for the Purpose of regulating the business of insurance." 15 U.S.C. § 1012(b).

Upon cursory review, one might easily conclude that section 626.988 *is* such a law, as the provision is found in the middle of the myriad of Florida's insurance rules, in the statutory chapter (626) entitled "Insurance Field Representatives and Operations." Section 626.988 in particular is set in this chapter's Part X, entitled "Unfair Insurance Trade Practices." Nevertheless, the Supreme Court has cautioned—as recent as its last term—that with respect to this inquiry, "'mere matters of form need not detain us.'" *U.S. Dep't of Treasury v. Fabe*, ___ U.S. ___, ___, 113 S. Ct. 2202, 2210, 124 L. Ed. 2d 449 (1993) (quoting *National Securities*, 393 U.S. at 460, 89 S. Ct. at 568). Thus, while the Court finds the "location" of section

626.988 to be *relevant*, it is not the sole factor upon which this inquiry turns.

Instead, the Court must attempt to gauge the larger intent and design of section 626.988. In *Fabe* the Court stated that this "broad category" consists of those laws possessing the "'end, intention or aim' of adjusting, managing or controlling the business of insurance." ___ U.S. at ___, 113 S. Ct. at 2210 (citation omitted). *Fabe* involved an Ohio statute which accorded the United States fifth priority in bankruptcy proceedings involving insurers. The question presented was whether the Ohio statute was preempted by a federal priority statute according the United States first priority with respect to a bankrupt debtor's obligations. The Court concluded that the Ohio priority statute, to the extent that it furthers the interests of policyholders—indeed, to the extent that it "regulates" policyholders—*was* a law enacted for the purpose of regulating the business of insurance. *Id.* ___ U.S. at ___, 113 S. Ct. at 2212. Accordingly, that portion of the Ohio statute was saved from preemption under McCarran-Ferguson. [4]

Fabe was not the first instance in which the Court considered the relationship between insured and insurer in applying McCarran-Ferguson. In the *National Securities* case, the Court observed that the focus of the Act was "on the relationship between the insurance company and the policy-holder," and that "[s]tatutes aimed at protecting or regulating this relationship, *directly or indirectly*, are laws regulating the 'business of insurance.'" 393 U.S. at 460, 89 S. Ct. at 569 (emphasis supplied).

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[4] To the extent that it was designed to further the interests of other "creditors," however, the Ohio statute was *not* a law enacted for the purpose of regulating the business of insurance.

Simply put, section 626.988 purports to prevent certain entities from selling insurance. Thus, it would appear to define or regulate a relationship between insurer and *potential* policyholder, that is, the insurance-purchasing public at large, rather than one between insurer and *present* policyholder. In light of this, does the McCarran-Ferguson Act and its relevant jurisprudence, noted above, still apply? Particularly in light of state court construction of section 626.988, the Court would answer in the affirmative.

In *Glendale Federal S & L v. Dept. of Ins.*, 587 So.2d 534 (Fla. 1st DCA 1991), *rev. denied*, 599 So.2d 656 (Fla. 1992), a Florida appellate court affirmed a final summary judgment that section 626.988 did not violate the equal protection clause of the Fourteenth Amendment. The court affirmed and specifically referenced the Circuit Court's finding that:

> Concerns regarding financial institutions' entry into insurance activities, including the prevention of coercion, unfair trade practices, and undue concentration of resources, existed at the time of passage of the statute and remain valid today . . . [A] *legislature could well have decided* that some protection was required.

587 So.2d at 536 n. 1 and 537. In an earlier decision construing whether certain entities were "financial institutions" with the meaning of section 626.988, the same court noted:

> Insurance is an industry affected with a public interest and subject to regulation by the States. The Legislature has determined that there is potential for abuse inherent in financial institutions being involved in the sale of insurance, and that the licensing of

> employees of financial institutions is not in the public interest.

Production Cr. Ass'ns of Fla. v. Dept. of Ins., 356 So.2d 31, 32 (Fla. 1st DCA 1978).

Plaintiff also notes, correctly, that neither of those cases dealt with the McCarran-Ferguson Act. Nevertheless, the Court would be most remiss if it were to not consider these opinions merely because they addressed different *legal* challenges. For example, *Glendale* involved an equal protection challenge, and the Court notes, emphatically, that the instant Complaint raises no such challenge. However, that the *Glendale* court proposed its findings concerning section 626.988 in the context of citing a "rational basis" for the statute does not mean that the "rationale" stated therein cannot be considered by this Court.

The parties to the instant matter appear to be at odds over the extent to which this Court should defer to those state court findings, particularly those made within *Glendale*. Defendants cite the case of *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981) for the proposition that a state court's interpretation of a state statute may be rejected only if it "could not have been a goal of the legislation." *Id.* at 470, 101 S. Ct. at 1205. Plaintiff, on the other hand, argues that *Michael M.* is inapposite, as it, like *Glendale*, involved an equal protection challenge, a context in which state court determinations are more generally entitled to great deference.

However, this Court needs no Supreme or other Court precedent to instruct it in the degree to which it may—or must—defer to state court interpretations of a *state* statute. The Florida courts—in particular the District Courts of Appeal—routinely are called on to evaluate, apply and

interpret the Florida statutes, and do this far more often than the federal district courts sitting in this state. Thus, at least to the undersigned, it goes without saying that a *great* degree of deference ought to be given such decisions. State judges in Florida are just as capable and competent—if not more so—to interpret state laws as any federal judge.

In *National Securities*, the Supreme Court held that statutes aimed at protecting the relationship between insurer and insured, *"directly or indirectly,"* are statutes regulating the business of insurance. 393 U.S. at 460, 89 S. Ct. at 568. The Court construes the term "policyholder" in its broadest sense, as to encompass both existing and potential purchasers of insurance. Future policyholders, then, are "indirectly" affected by regulations such as section 626.988. Thus, the Court finds that Florida section 626.988 indirectly protects the relationship between insurer and insured because it is aimed at protecting the insurance purchasing public at large. This law "furthers the interests," *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2208, of the potential policyholding public, regulates the potential policyholding public and, therefore, is a "law enacted for the purpose of regulating the business of insurance" within the meaning of McCarran-Ferguson.

Additionally, this last point is supported by the trial testimony of Douglas Alan Shropshire, who is Director of Legal Services for Defendant DOI. In describing how DOI enforces the state's insurance laws, Shropshire related the need for protection of policyholders through regulating the financial stability of insurance companies. The concern of the state is that insurance companies remain solvent and have the ability to pay claims when demands are made. Such regulation by the state, according to Shropshire, often requires insurance companies and agents to abide by certain actuarial requirements in determining the extent of the risk

involved in the coverage. The state's concern, then, is that insurance not be sold through institutions which require such coverage in order to conduct other business, and that such institutions would be lax or indifferent to enforcing actuarial standards. Shropshire stated that such institutions, particularly banks, might require their customers seeking loans for certain properties (e.g., home or automobile) to purchase "needed" insurance through the institution's insurance agent.

The Court concurs with the concerns noted by the witness. For example, in order to make a profit on automobile loans or home mortgages, the insurance agents may incur business they might otherwise reject because they would be pressured by the bank to do so in order to consummate the bank's loan transactions. This might lead to the over-insurance of risky business, which could result in the insolvency of the insurer.

Additionally, and notwithstanding the existence of specific prohibitions on coercive credit extension, the Court finds that loan officers could steer customers to the bank's insurance agent for the purpose of suggesting the sale of insurance that is not needed, in order for the bank to make a profit on the insurance policy. The concern herein expressed is that an arms-length relationship be maintained among the bank, the loan officer and the insurance agents. The maintenance of this relationship is for the protection of the solvency of the insurance industry, and the prevention of coercion, which in turn protects all potential, present and future policyholders.

Furthermore, the Court notes that the declaration or purpose section of Part X of chapter 626, in which section 626.988 is located, specifically references the McCarran-Ferguson Act:

> The purpose of this part is to regulate trade practices relating to the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Pub. L. No. 15, 79th Congress), by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

Fla. Stat. ch. 626.951(1). The statute also specifically refers to section 92. *See id.* at 626.988(8). Thus, the Florida legislature was keenly aware that McCarran-Ferguson specifically affected section 92, and that in enacting section 626.988 the legislature made it clear that this was an *insurance* law, not a banking law.

Having concluded that section 626.988 is such a law, the Court must then determine the preemptive effect, if any, of section 92 of the Federal Reserve Act. As stated in *Fabe*,

> The McCarran-Ferguson Act did not simply overrule *South-Eastern Underwriters* and restore the status quo. To the contrary, it transformed the legal landscape by overturning the normal rules of pre-emption. Ordinarily, a federal law supersedes any inconsistent state law. The first clause of § 2(b) [of the Act] reverses this by imposing what is, in effect, a clear-statement rule, a rule that *state laws enacted "for the purpose of regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.*

___ U.S. at ___, 113 S. Ct. at 2211 (emphasis supplied). Thus, unless section 92 *specifically* relates to the business of

insurance," 15 U.S.C. § 1012(b), or expressly requires that state law be preempted, then the validity and effectiveness of Florida's section 626.988 is not disturbed by section 92.

In *National Bank of Oregon*, the Supreme Court stated that section 92 "remains in force." ___ U.S. at ___, 113 S. Ct. at 2187. In reviewing the context of that legislation, and stating that "section 92 travels together with the paragraphs around it," *id.* ___ U.S. at ___, 113 S. Ct. at 2185, the Court noted that section 92 was placed between new provisions granting additional powers to Federal Reserve banks (which had existed only for three years prior to the 1916 addition of section 92) and also subjecting powers of such banks to regulation by the Federal Reserve Board. The Court did not address the question of whether section 92 was "specifically related" to the business of banking or insurance, but its emphasis on these amendments—in particular, section 92—being a part of the *Federal Reserve Act* does not tend to suggest that section 92 either is specifically related to the business of insurance or that Congress specifically intended that section 92 preempt state insurance laws.

Most significantly, though, section 92 fails to satisfy *Fabe's* (really McCarran-Ferguson's) clear statement rule. As Plaintiff notes, section 92 does contain plain language entitling national banks to act as insurance agents under limited circumstances. However, section 92 simply fails to manifest any express intent to preempt state insurance laws. That silence is particularly understandable given the historical *fact* that section 92 was enacted "at a time when the business of insurance was believed to be beyond the reach of Congress' power under the Commerce Clause." *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2212. Even *South-Eastern Underwriters*, which briefly altered the preemption landscape, noted that prior to 1944 Congress "at no time"

had attempted to control the business of insurance. 322 U.S. at 544, 64 S. Ct. at 1168. Until that decision was rendered, neither Congress nor the Court believed that insurance fell under the Commerce Clause. *See Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183, 19 L. Ed. 357 (1869) (issuing policy of insurance "not a transaction of commerce"). Thus, in 1916, when section 92 was enacted, Congress could not have been attempting to regulate the business of insurance.

One other district court, faced with a somewhat analogous apparent conflict between section 92 and a state insurance regulation, held unequivocally that section 92 was a "bank" law:

> The "business of insurance" has been narrowly defined, and it seems fairly obvious that § 92 does not constitute Congressional regulation of that business. This section['s] . . . function is to grant additional powers to national banks. That the power involves insurance does not transform this section into a regulation of the business of insurance.

Owensboro Nat'l Bank v. Moore, 803 F. Supp. 24, 36 (E.D. Ky.1992). [5]

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[5] In that case a Kentucky statute prohibited any person owning greater than one-half the capital stock of a bank from acting as an insurance agent or broker, with the exception of certain credit-type insurance. Finding section 92 to be "contrary federal law," the court concluded with "no difficulty," that section 92 preempted the Kentucky statute. 803 F. Supp. at 35.

Additionally, the outcome of that court's McCarran-Ferguson analysis differed from that in the present case, Judge Hood finding that the Kentucky statute did not constitute insurance regulation. *Owensboro*, however, is distinguishable for three important reasons. First, there was no state caselaw upon which Judge Hood could rely for the meaning and/or purpose of the state regulation. Second, the Kentucky provision was located within that chapter of the state statutes regulating banks and trust companies, not that portion which regulates insurance. Lastly, the court there applied the tripartite test announced in *Union Labor Life ins. Co. v. Pireno*, 458 U.S. 119, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982) for determining whether a state law governs the "business of insurance." As the subsequently decided *Fabe* made clear, and as the instant Defendants have duly noted, the *Pireno* test applies to the *second* clause of McCarran-Ferguson (relating to the scope of antitrust immunity), while the instant analysis—and that in *Fabe*—relates to the *first* clause of the Act. In this vein, it should also be noted that *Fabe* was a Sixth Circuit case, and was remanded to that court of appeals, before which an appeal from *Owensboro* presently lies.

Accordingly, the Court concludes that section 92 neither "specifically relates to the business of insurance," 15 U.S.C. § 1012(b), nor "specifically requires," *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2211, that apparently conflicting state laws be preempted. Thus, under McCarran-Ferguson, section 626.988 is saved from preemption.

As noted above, this case presents difficult questions concerning the interplay between federal and state legislation. Yet while the denouement of the present lawsuit will immediately frustrate Plaintiff's attempts to sell insurance, Plaintiff is not without other, more appropriate avenues of relief. In short, to remedy to this perceived inequity, Plaintiff and similarly situated financial institutions should consider looking neither to the Comptroller of Currency nor the federal courts, but rather, as a distinguished jurist once pointed, "to Congress." *Saxon v. Georgia Ass'n of Independent Ins. Agents, Inc.*, 399 F.2d 1010, 1021 (5th Cir.1968) (Thornberry, J., concurring).

In accordance with the terms of this Opinion and Order, Plaintiff's Motions for a Preliminary Injunction (Docs. No. 4 and 24) are **DENIED**, and Plaintiff's request

for permanent injunctive and declaratory relief is **DENIED** in its entirety. In light of this holding, Defendants' counterclaims are **MOOTED**. [6]

The Clerk hereby is directed to (1) enter judgment for Defendants on Plaintiff's Complaint; (2) tax costs accordingly; and (3) close the file.

DONE AND ORDERED.

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[6] By virtue of the Court's refusal to enjoin Defendant Gallagher's enforcement of the Cease and Desist Order, Plaintiff cannot sell insurance out of its Belleview branch. Thus, all the other requests set forth in the Counterclaims are moot, and the Court would furthermore be required to render advisory opinions, which it may not do under the case or controversy requirement of Article III of the Constitution.

APPENDIX C
Unreported

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
March 28, 1995

No. 93-3508

BARNETT BANK OF MARION COUNTY, N.A.,
a national banking association,

Plaintiff-Counter-Defendant-Appellant,
Cross Appellee,

versus

TOM GALLAGHER, Insurance Commissioner of the State of Florida; FLORIDA DEPARTMENT OF INSURANCE, a state agency,

Defendants-Appellees,
Cross-Appellants,

FLORIDA ASSOCIATION OF LIFE UNDERWRITERS; PROFESSIONAL INSURANCE AGENTS OF FLORIDA, INC.; FLORIDA ASSOCIATIONS OF INSURANCE AGENTS,

Defendants-Counter-Claimants-Appellees,
Cross-Appellants.

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: COX, Circuit Judge, FAY, Senior Circuit Judge, and CARNES*, District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/S/ Emmett R. Smith
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

*Honorable Julie E. Carnes, U.S. District Judge for the Northern District of Georgia, sitting by designation.

APPENDIX D
44 F.3d 388

THE OWENSBORO NATIONAL BANK; The First National Bank of Louisa; Citizens National Bank of Paintsville; Kentucky Bankers Association, Plaintiffs-Appellees,

United States of America, Intervening Plaintiff-Appellee,

v.

Don W. STEPHENS, Commissioner, Department of Insurance, Commonwealth of Kentucky, Defendant-Appellant (92-6330),

Kentucky State Association of Life Underwriters, Independent Insurance Agents of Kentucky, Inc.; Kentucky Association of Professional Insurance Agents, Intervening Defendants-Appellants (92-6331).

Nos. 92-6330, 92-6331

United States Court of Appeals,
Sixth Circuit.

Argued Sept. 29, 1994.

Decided Dec. 29, 1994.

M.T. Senn (argued and briefed), Morgan & Pottinger, Louisville, KY, M. Brooks Senn, Kentucky Bankers Ass'n, Louisville, KY, for plaintiffs-appellees.

Joseph L. Famularo, U.S. Atty., Lexington, KY, Anthony J. Steinmeyer, Jacob M. Lewis (argued and briefed), Dept. of Justice, Appellate Staff, Civil Div., Rosa M. Koppel, Office of Comptroller of Currency, Paul W. Bridenhagen, Anne L. Weismann, Dept. of Justice, Washington, DC, for intervenor-appellee in No. 92-6330.

Stephen B. Cox (briefed), Kentucky Dept. of Ins., Frankfort, KY, Ann M. Kappler (argued and briefed), Jenner & Block, Washington, DC, for defendant-appellant.

Michael F. Crotty (briefed), American Bankers Ass'n Washington, DC, for amicus curiae American Bankers Ass'n.

Joseph L. Famularo, U.S. Atty., Lexington, KY, Rosa M. Koppel, Office of Comptroller of Currency, Paul W. Bridenhagen, Anne L. Weismann, Dept. of Justice, Washington, DC, for intervenor-appellee in No. 92-6331.

Jonathan B. Sallet, Ann M. Kappler (argued), Jenner & Block, Washington, DC, Terrell L. Black, Larry R. Blanton, Black, Carle, Maze & Wilmes, Louisville, KY, for intervenors-appellants.

Before GUY and BATCHELDER, Circuit Judges; and McKEAGUE, District Judge. *

RALPH B. GUY, Jr., Circuit Judge.

Defendants, the Commissioner of the Kentucky Department of Insurance ("Commissioner") and various Kentucky insurance industry associations, appeal the district

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* Honorable David W. McKeague, United States District Court for the Western District of Michigan, sitting by designation.

court's grant of summary judgment in favor of plaintiffs, which are national banks doing business in Kentucky towns with populations of fewer than 5,000 persons. The district court concluded that a Kentucky statute that bars bank holding companies from acting as insurance agents was preempted by a federal statute that allows national banks operating in towns of fewer than 5,000 persons to act as insurance agents. On appeal, defendants argued that the Kentucky statute, Ky. Rev. Stat. Ann. § 287.030(4) ("section 287"), does not conflict with the federal statute, 12 U.S.C. § 92, and that, in any event, the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, and section 7 of the Bank Holding Companies Act, 12 U.S.C. § 1846, each "immunize" section 287 from preemption by § 92. We reject these arguments and affirm.

I.

In late 1990, plaintiffs submitted to the Commissioner requests for applications for licenses to act as life and general line insurance agents in Kentucky. The Commissioner denied these requests, but scheduled a hearing before a state administrative law judge ("ALJ") on the issue of whether section 287 barred plaintiffs from acting as insurance agents. Before the hearing was held, however, plaintiffs filed this lawsuit, seeking declaratory and injunctive relief. A Kentucky state court thereafter granted plaintiffs' request for a stay of the administrative proceedings pending the outcome of this lawsuit. Meanwhile, a number of Kentucky insurance industry associations intervened on behalf of the Commissioner in this lawsuit. The United States intervened on behalf of plaintiffs. Defendants filed a motion to dismiss, arguing that the case was not justiciable because of the unfinished administrative proceeding before the ALJ. Plaintiffs then filed a motion for summary judgment, to which defendants responded by filing a cross-

motion for summary judgment. In a published opinion, *see* 803 F. Supp. 24 (E.D. Ky. 1992), the district court determined that the case was justiciable,[1] granted plaintiffs' motion for summary judgment, and granted plaintiffs the relief they sought. This appeal followed.

II.

Defendants first argue that section 287 is not preempted by § 92 under conventional preemption analysis. Section 287 provides:

> No person who after July 13, 1984, owns or acquires more than one-half(½) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, insurance of the interest of a real property mortgagee in mortgage property, other than title insurance.

Ky. Rev. Stat. Ann. § 287.030(4). Section 92 provides:

> In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, *may*, under such rules and regulations as may be prescribed by the Comptroller of the Currency, *act as the agent for any fire, life, or other insurance*

[1]Defendants have not raised any justiciability issues on appeal, and the district court appears to have decided them correctly.

> *company* authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; *and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: Provided, however*, That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

12 U.S.C. § 92 (emphasis added).

It is well settled that "the Supremacy Clause, U.S. Const. Art. VI, cl. 2, invalidates state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough County v. Automated Medical Labs*, 471 U.S. 707, 712 (1985). One of the ways in which a state law may "interfere" with a federal law is by coming into "actual[] conflict[]" with it, *i.e.*, by 'stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]'" Id. at 713.

The Supreme Court has applied this "actual conflict" standard in cases with facts similar to those presented here. In *Franklin National Bank v. New York*, 347 U.S. 373 (1954), the Court considered whether a New York law that prohibited use of the word "savings" in advertising for banks other than state-chartered savings banks was preempted by a federal law that authorized national banks "to receive

deposits without qualification or limitation, and . . . [to] possess 'all such incidental powers as shall be necessary to carry on the business of banking[.]'" *Id.* at 376. Although the federal law only implicitly permitted federal banks to use the word "savings" in their advertising, the Court concluded that there was "a clear conflict between the law of New York and the law of the Federal Government." *Id.* at 378. Similarly, in *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141 (1982), the Court considered whether a California law that prohibited the inclusion of a due-on-sale clause in loan instruments was preempted by a federal regulation that expressly granted to federal savings and loans the power to include such clauses in loan instruments. Noting that the conflict between the state law and federal regulation did not "evaporate" because the "regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts[,]" *id.* at 155, the Court easily concluded that preemption was appropriate. *Id.* at 159.

The conflict between section 287 and § 92 is no different than those present in *Franklin National Bank* and *de la Cuesta*. For purposes of deciding the federal preemption issue only, the plaintiff national banks assumed as correct the Commissioner's position that section 287 applies not only to bank holding companies but also to subsidiaries thereof, such as national banks. Thus, while § 92 provides that national banks such as plaintiffs "may" act as insurance agents, section 287 provides that they "may not."

Seizing upon the permissive nature of the right created by § 92, however, defendants suggest that we should "reconcile" the two sections by construing the right created by § 92 to be subject to state law restrictions such as section 287. That construction might be plausible if § 92 provided that certain national banks "*may have the power*" to act as

insurance agents. But § 92 actually states that certain national banks "*may* under such rules. . . as may be prescribed by the Comptroller of the Currency, *act as the agent for*" certain insurance companies. Providing that a bank "may act" is no different than providing that a bank "*shall have the power* to act." Thus, the language of § 92 does not permit the construction defendants advocate. That the power created by § 92 is permissive does not allow us to conclude that it does not exist. [2]

Defendants also contend that our construction of § 92 assumes that Congress acted with an "unconstitutional motive" in passing § 92, since the regulation of the business of insurance was understood to be beyond Congress's Commerce Clause powers when § 92 was passed in 1916. But § 92 in no way governs the manner in which the business of insurance is conducted; rather, it merely helps to define the powers of national banks. Congress has been understood to have the authority to define those powers since the Court's decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), so we reject defendants' contention.

Finally, we note that section 287 interferes with the realization of a chief object of § 92. That object is to increase the number of banks serving small towns by creating "additional sources of revenue" for such banks. Letter from Comptroller John Skelton Williams to Sen.

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[2] The United States emphasizes that, in a 1990 letter to the Louisiana Commissioner of Insurance, the Chief Counsel of the Office of the Comptroller concluded that the right created by § 92 is not subject to state law restrictions. Because we reach the same conclusion without taking this letter into account, we need not determine whether such an informally expressed opinion is entitled to deference under the doctrine set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Robert L. Owen, *reprinted in* 53 Cong. Rec. 11001 (1916). (App. at 159). Section 287 removes that source of revenue and thus "create[s] 'an obstacle to the accomplishment and execution of the *full* purposes and objectives [of Congress].'" *de la Cuesta*, 458 U.S. at 156 (emphasis added). Like the district court, we conclude that, under conventional preemption analysis, § 92 preempts section 287.

Defendants next argue that the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, "immunizes" section 287.030(4) from preemption by § 92. The relevant portion of the McCarran-Ferguson Act provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . .

15 U.S.C. § 1012(b). Thus, section 287.030(4) is not preempted by § 92 if (1) section 287 was "enacted . . . for the purpose of regulating the business of insurance," and (2) § 92 does *not* "specifically relate[] to the business of insurance.

We first consider whether section 287 was "enacted . . . for the purpose of regulating the business of insurance." The "business of insurance" is made up of "practices" and "activities" that satisfy the criteria set forth in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982). Those criteria are:

> *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and insured; and *third*, whether the practice is limited to entities within the insurance industry.

Id. at 129.

Citing *United States Department of Treasury v. Fabe*, 113 S. Ct. 2202 (1993), however, defendants contend that the *Pireno* criteria are "not applicable" to the determination of whether a state law was "enacted . . . for the purpose of regulating the business of insurance." (Defendants' Brief at 24 n.22). We disagree. It is true that *Pireno* addressed the scope of the antitrust immunity arising under the second clause of § 1012(b). That clause provides an exemption from federal antitrust laws for activities that (1) are regulated by state law and (2) qualify as the "business of insurance." *See* 15 U.S.C. § 1012(b). Thus, "the first clause [of § 1012(b)] commits laws 'enacted . . . for the purpose of regulating the business of insurance' to the States, while the second clause exempts only 'the business of insurance' itself from the antitrust laws." *Fabe*, 113 S. Ct. at 2209. Whether a particular activity is part of the "business of insurance" is, of course, a separate question from whether a state law was "enacted . . . for the purpose of regulating the business of insurance." The *Fabe* Court accordingly noted that the latter question cannot be answered by reference to the *Pireno* criteria alone. But that does not mean those criteria simply are "not applicable" in cases involving the first clause of § 1012(b). If, in such a case, the issue arises of whether a particular activity is part of the "business of insurance," the *Pireno* criteria apply. *See Fabe*, 113 S. Ct. at 2208 (noting in considering claim that arose under first clause of § 1012(b), that *Pireno* "identified the three criteria . . . that *are* relevant in determining what activities constitute the 'business of insurance.'") (emphasis added). In short, the *Fabe* Court merely noted that the scope of the

respective immunities created by the first and second clauses of § 1012(b) are different; it assuredly did not give "business of insurance" one meaning in the first clause and a different meaning in the second.

The *Fabe* Court went on to hold that "[t]he broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." 113 S. Ct. at 2210. Thus, to have been "enacted . . . for the purpose of regulating the business of insurance," section 287 must possess the aim of regulating activities that meet the *Pireno* criteria.

Section 287 does not possess such an aim. That section helps to define the powers of Kentucky bank holding companies by excluding such companies from participation in the activities that constitute the "business of insurance." Excluding a person from participation in an activity, however, is different from regulating the manner in which that activity is conducted. The former is the regulation of the person; the latter is the regulation of the activity. Section 287 only regulates persons owning "more than one-half (½) of the capital stock of a bank"; it in no way governs the manner in which the activities constituting the "business of insurance" are conducted. Section 287 thus is different in kind from the Ohio statute that was found to regulate the business of insurance in *Fabe*, since the Ohio statute set standards for "the actual performance of an insurance contract." 113 S. Ct. at 2210. *See also United Servs. Auto. Ass'n v. Muir*, 792 F.2d 356, 364 (3rd Cir. 1986) (state law forbidding banks from being licensed as insurers "ha[d] no part in the business of insurance under McCarran-Ferguson"); *but see SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969) (stating in dicta that state laws

governing "the licensing of [insurance] companies and their agents . . . [are] within the scope of" McCarran-Ferguson).

Since we conclude that section 287 was enacted for the purpose of regulating certain conduct by bank holding companies, not the business of insurance, we need not consider whether § 92 "specifically relates to the business of insurance"; for, without regard to whether § 92 so relates, McCarran-Ferguson cannot save section 287 from preemption.

Defendants' remaining argument is that section 287 cannot be preempted by § 92 because "section 7 of the Bank Holding Company Act [12 U.S.C. § 1846] expressly reserves to the Commonwealth the authority to regulate bank holding companies, and their subsidiaries, through state regulation such as [section 287]." (Defendants' Brief at 28). In making this argument, defendants ignore the plain language of § 1846, which provides:

> No provision *of this chapter* shall be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to companies, banks, bank holding companies, and subsidiaries thereof.

12 U.S.C. § 1846 (emphasis added). Here, § 92 is the provision that prevents Kentucky from exercising the power to enforce section 287. Section 92 is found in chapter 2 of title 12, while § 1846 is found in chapter 17 of that title. Since § 92 is a provision of a chapter other than the chapter in which § 1846 is found, § 92 may be construed to prevent

Kentucky from exercising the power to enforce section 287. Section 1846 simply is irrelevant to this case.

AFFIRMED.

BATCHELDER, Circuit Judge, dissenting.

I disagree with the majority's decision affirming the district court in granting summary judgment and injunctive relief for the plaintiffs. Therefore, I respectfully dissent from the Court's opinion.

I.

Defendants-Appellants present three central arguments in this appeal: (1) that Kentucky Revised Code § 287.030(4) ("section 287") is not preempted by 12 U.S.C. § 92 under traditional preemption analysis; (2) that the McCarran-Ferguson Act protects section 287 from preemption by § 92; and (3) that section 287 cannot be preempted by § 92 because of language contained in the Bank Holding Company Act (BHCA).

I agree with the majority's analysis of the first and third issues raised by the defendants. I respectfully disagree, however, with the majority's opinion on the issue of McCarran-Ferguson preemption. It is my belief that the McCarran-Ferguson Act does, in fact, shield the state statute, section 287, from preemption by the federal statute, § 92.

II.

As the majority accurately states, the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (referred to hereafter as § 2(b)), protects section 287 from preemption by § 92 if two

factors are satisfied. First, the state statute, section 287, much have been "enacted . . . for the purpose of regulating the business of insurance." McCarran-Ferguson § 2(b). Second, the federal statute, § 92, must *not* "specifically relate[] to the business of insurance." *Id*. If both of these requirements are met, the state statute will not be preempted by the federal statute.

In this case, I believe both factors have been satisfied. First, section 287 was clearly enacted by the Kentucky legislature to regulate the business of insurance. Second, § 92 does not specifically relate to the business of insurance.

A. McCarran-Ferguson

The McCarran-Ferguson Act was enacted by Congress in 1945 in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). In *South-Eastern Underwriters*, the Court held that regulation of interstate insurance activity was within the Commerce Clause power of Congress. *Id*. at 553. Congress responded adversely to the Court's decision, immediately enacting McCarran-Ferguson "to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *Securities and Exchange Comm'n v. National Secs., Inc.*, 393 U.S. 453, 459 (1969).

Consistent with its view that the business of insurance is "'a local matter, to be subject to and regulated by the laws of the several States,'" Congress explicitly intended the McCarran-Ferguson Act to restore state taxing and regulatory powers over the insurance business to their pre-*South-Eastern Underwriters* scope. *Western and Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 654

(1981) (citing H.R.Rep. No. 143, 79th Cong., 1st Sess. 2 (1945)). Undeniably, the purpose of the McCarran-Ferguson Act was to "give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946).

Clearly, Article I, Section 8 of the United States Constitution grants Congress the power to regulate interstate commerce, including interstate insurance, if it so chooses. U.S. Const., Art. I, § 8, cl. 3; *see also South-Eastern Underwriters*, 322 U.S. at 539-45. It is nonetheless true that Congress may limit its own Commerce Clause power to grant the states "an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis v. BT Inv. Managers, Inc.* 447 U.S. 27, 44 (1980). The enactment of the McCarran-Ferguson Act represents such a situation in which, once the Supreme Court held that the regulation of interstate insurance was within Congress's commerce power, Congress exercised its plenary power by enacting McCarran-Ferguson to limit its own power by providing for regulation by the states instead.

B. Kentucky Section 287

Section 287.030(4) of the Kentucky Revised Code purports to prevent state or national banks from selling any insurance other than those narrow categories permitted by the statute. The applicable language of the statute reads:

> (4) No person who after July 13, 1984, owns or acquires more than one-half (½) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, insurance of the interest of real property mortgagee in mortgaged property, other than title insurance.

Ky. Rev. Stat. Ann. § 287.030 (Baldwin 1987). In a 1970 opinion, the Kentucky Attorney General determined that the provision applied to state banks as well as national banks doing business in Kentucky. Ky. Op. Att'y Gen. 70-643 (1970).

Defendants contend that section 287 "falls squarely" within § 2(b)'s requirement that a state statute be enacted to regulate the business of insurance to escape preemption by federal law. The district court found, to the contrary, that the Kentucky statute was not enacted to regulate the business of insurance. *Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24, 36 (E.D. Ky. 1992). The district court's holding was based in part on the location of section 287 in the chapter of the Kentucky Revised Statutes regulating banks and trust companies. The lower court also based its decision on the three-part test set out in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). In its opinion, the majority also relied upon *Pireno* to determine what activities constitute the "business of insurance."

I respectfully disagree that the *Pireno* factors apply to this case. Rather, I believe that the defendants are correct that the Supreme Court's recent opinion in *United States Department of Treasury v. Fabe*, 113 S. Ct. 2202 (1993), sets the controlling criteria in this case. *See also Colonial Life and Accident Ins. Co. v. American Family Life Assurance Co.*, 846 F. Supp. 454, 459 (D.S.C. 1994) ("while . . . the *Pireno* criteria are relevant in determining the applicability vel non of the antitrust exemption, they are not determinative with respect to the first clause of Section 2(b)").

C. Fabe *and the application of* § 2(b)

In *Fabe*, the Court held that an Ohio priority statute was saved from federal preemption to the extent that it regulated the relationship between an insurance company and its policyholders. *Fabe*, 113 S. Ct. at 2208. The Court, in its analysis, made an important distinction between the first and second clauses of § 2(b). According to the Court, the first clause deals with those state laws (such as section 287) enacted for the purpose of regulating insurance. The clause saves applicable state laws from federal preemption. The second clause, however, exempts from preemption "only 'the business of insurance' itself from the *antitrust laws*." *Fabe*, 113 S. Ct. at 2209 (quoting § 2(b) of McCarran-Ferguson) (emphasis added).

Thus, the *Fabe* Court explicitly distinguished the first clause of § 2(b) from the second clause, making it clear that the first clause "is not so narrowly circumscribed" as the second clause of § 2(b). *Id.* As the Court stated,

> The language of 2(b) is unambiguous: the first clause commits laws "enacted . . . for the purpose of regulating the business of insurance" to the States, while the second clause exempts only "the business of insurance" itself from the antitrust laws. To equate laws "enacted . . . for the purpose of regulating the business of insurance" with the "business of insurance" itself, as petitioner urges us to do, would be to read words out of the statute. This we refuse to do.

Id. at 2209-10 (footnote omitted).

The Court further disputed the allegation that it was violating a "'basic rule of statutory construction that identical

words used in different parts of the same act are intended to have the same meaning.'" *Fabe*, 113 S. Ct. at 2210 n. 6. According to the Court, "[t]his argument might be plausible if the two clauses actually employed identical language." *Id.* As the Court illustrated, however, the two clauses do not use identical language, rather "the first clause contains the word 'purpose,' a term that is significantly missing from the second clause." *Id.* Failure to distinguish the first clause of § 2(b) from the second clause therefore "overlooks another maxim of statutory construction: ' that a court should "give effect, if possible, to every clause and word of a statute."'" *Id.* (citations omitted). Therefore, the majority here cannot justify its failure to distinguish between the two parts of § 2(b) by "assur[ing]" us that the "business of insurance" has only one meaning. Maj. opinion at pp. 391-92.

Clearly, the first clause applies to a broader category of laws than the second clause. However the Court did more than "merely note" that the scope of the first and second clause of § 2(b) are "different," as the majority described the holding of *Fabe*. Maj. opinion at pp. 391-92. Rather, the *Fabe* Court described the first clause as applicable to "laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Id.* at 2210 (citation omitted). "This category necessarily encompasses more than just the 'business of insurance.'" *Id.*

Several prominent cases before *Fabe* dealt with the "business of insurance" within the meaning of the second clause of § 2(b). *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982); *Group Life & Health Ins. Co. v. Royal*

Drug Co., 440 U.S. 205 (1979). A tripartite test[1] consequently developed out of these cases when the second clause of § 2(b) was at issue. The district court in the case at hand understandably relied on *Pireno's* tripartite test because *Fabe* had not yet been decided. In light of *Fabe*, however, I believe that both the district court's and the majority's reliance on *Pireno* is misplaced. For example, the majority relied on language from *Fabe* "that *Pireno* 'identified the three criteria . . . that *are* relevant in determining what activities constitute the "business of insurance."'" Maj. opinion at p. 392 (quoting *Fabe*, 113 S. Ct. at 2208). However, this quotation appeared in the *Fabe* Court's presentation of the issues, *before* the Court actually analyzed *Pireno* and distinguished it from the Ohio statute then being considered. In its subsequent analysis of *Pireno*, the Court clearly limited the scope and application of *Pireno's* tripartite test stating: "*Pireno* and *Royal Drug* held *only* that 'ancillary activities' that do not affect performance of the insurance contract or enforcement of contractual obligations do not enjoy the antitrust exemption for laws regulating the 'business of insurance.'" *Fabe*, 113 S. Ct. at 2209 (quoting *Pireno*, 458 U.S. at 134 n. 8) (emphasis added). Furthermore, the Court distinguished the Ohio statute from *Pireno* stating that *Pireno* should "not [be] read . . . to suggest that the business of insurance is confined

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[1]Pursuant to *Pireno's* tripartite test, the "business of insurance" under the second clause of § 2(b), is determined by considering the following:

> [F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Pireno, 458 U.S. at 129.

entirely to the writing of insurance contracts, as opposed to their performance." *Id.*

D. McCarran-Ferguson Analysis—First Clause of 2(b)

After the *Fabe* Court distinguished the first and second clauses of § 2(b) from one another, it further examined the history of McCarran-Ferguson to determine Congress's intent in drafting the first clause of § 2(b). Congress's reaction to the Supreme Court decision in *South-Eastern Underwriters* arose in part from its concern with the nature of the insurance contract. In enacting McCarran-Ferguson, Congress intended for the contract between an insurer and its policyholder to be controlled and regulated by the state. The legislation was aimed at:

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly are laws regulating the "business of insurance."

Securities and Exch. Comm'n v. National Secs., Inc., 393 U.S. 453, 460 (1969).

1. Section 287: Enacted to Regulate the Business of Insurance

The proper standard to apply, therefore, when determining whether the Kentucky statute at issue falls within the intended scope of McCarran-Ferguson, is to examine whether the statute is centrally concerned with policyholders. Defendants allege that section 287 was enacted to regulate the business of insurance. According to *Fabe*, this means the statute must have been enacted to protect or regulate the relationship between the insurer and the policyholder.

According to the majority, section 287 merely regulates a group of people which it intended to prevent from entering the insurance industry. Such exclusion of a person from participation in an activity is not viewed by the majority as regulation of the activity itself. I do not agree with this concept.

The only other federal court to address this issue recently examined a Florida statute that prevented insurance agents associated in any way with a financial institution from engaging in insurance agency activities. *Barnett Banks v. Gallagher*, 839 F. Supp. 835 (M.D. Fla. 1993). The Florida statute and section 287 therefore achieve the same goal—to prevent banks from selling general insurance—by slightly different means. Florida's statute restricted the activities of insurance agents while Kentucky's section 287 restricts the activities of bank holding companies. Like section 287, the Florida statute regulates a particular group of people by prohibiting them from entering the insurance industry. Unlike the majority in the case at hand, however, the court in *Barnett Banks* gauged the "larger intent" of the Florida statute and found the law was enacted to "'further[] the interests' of the potential policyholding public, [to] regulate[] the potential policyholding public and, therefore,

[was] a 'law enacted for the purpose of regulating the business of insurance' within the meaning of McCarran-Ferguson." *Barnett Banks*, 839 F. Supp. at 840-41 (quoting *Fabe* and § 2(b) of McCarran-Ferguson).

Even *if* the majority is correct in distinguishing statutes that regulate persons from those that regulate the manner in which an activity is conducted, it improperly fails to consider whether section 287 regulates the business of insurance indirectly. When Congress enacted the McCarran-Ferguson Act, it envisioned the "business of insurance" to focus upon those statutes "aimed at protecting or regulating [the relationship between insurer and policyholder], directly *or indirectly* . . . ." *National Secs.*, 393 U.S. at 460 (emphasis added). Therefore, it is sufficient for the Kentucky legislature to indirectly govern the relationship between an insurance company and future policyholders by enacting a statute such as section 287 to regulate those persons the state wishes to exclude from the insurance industry. *See also Hoylake Inv. Ltd. v. Washburn*, 723 F. Supp. 42 (N.D. Ill.1989) (finding that an Illinois statute regulated the policyholder relationship in part because of the state's concern for the future solvency of its insurance companies). Whether a state chooses to regulate its insurance industry by prohibiting particular persons, entities, activities, or conduct—directly or indirectly—is immaterial. If the state aims to protect or regulate the insurer/insured relationship, it is regulating the business of insurance. *National Secs.*, 393 U.S. at 460.

By enacting section 287, the Kentucky legislature likewise intended to protect and regulate the relationship between insurer and insured at its most basic level. In a 1981 Advisory Opinion the Kentucky Attorney General outlined the amendments which led to section 287 and stated that it was "the clear intent of the legislature to limit the

involvement of majority bank shareholders, including one-bank holding companies, in insurance related activities." Ky. Op. Att'y Gen. 81-173 (1981). Later, a Kentucky House Resolution stated: "if banks were licensed to sell homeowners, automobile, and other lines of insurance, the consumer could feel coerced into purchasing insurance from the bank to obtain the loan regardless of the insurance premium." Ky. H.R. 91-SS-BR-198 (1991). The legislature enacted the statute out of a direct concern for future policyholders. It cannot be disputed, therefore, that section 287 was aimed to protect the insurance relationship between insurers and policyholders.

Obviously, the Kentucky legislature was concerned that if banks, national or state, were able to sell general insurance to their customers, the banks could unduly influence those Kentucky citizens and jeopardize the ability to pay claims when demands were made. *See Barnett Banks*, 839 F. Supp. at 840. The state has an important interest in protecting its citizens by ensuring that insurance companies remain solvent. *Id.* In an effort to protect the interests of its citizens, the Kentucky legislature should not be so constrained that all legislation intended to regulate the insurance industry, "'directly or indirectly,'" must be located only within its Insurance Code. *National Secs.*, 393 U.S. at 460.

The district court in the case at hand also was persuaded by plaintiffs' argument that section 287 does not regulate the business of insurance because it is not contained within Kentucky's Insurance Code, and is thus primarily intended to regulate bank holding companies rather than insurance. As the Supreme Court has said on this issue, however, "'mere matters of form need not detain us.'" *Fabe*, 113 S. Ct. at 2210 (quoting *National Secs.* 393 U.S. at 460). It is not enough to state baldly that because the particular

statute does not fall directly within the Insurance Code, it does not regulate the business of insurance. "Instead, the Court must attempt to gauge the larger intent and design" of section 287. *Barnett Banks*, 839 F. Supp. at 840.

Accordingly, it is enough that a state undertakes to regulate insurance generally for a specific statute or practice to fall within the meaning of McCarran-Ferguson. *McIlhenny v. American Title Ins. Co.*, 418 F. Supp. 364, 369 (E.D. Pa. 1976). It is well-established that the McCarran-Ferguson Act's "state regulation" requirement is satisfied by the general undertaking by a state to regulate the insurance industry. *See Federal Trade Comm'n v. National Casualty Co.*, 357 U.S. 560 (1958); *Ohio AFL-CIO v. Insurance Rating Bd.*, 451 F.2d 1178 (6th Cir. 1971), *cert. denied*, 409 U.S. 917 (1972). As illustrated by another circuit: "State power to regulate necessarily includes the discretion to prohibit, permit, or limit insurance practices as the state sees fit." *Dexter v. Equitable Life Assurance Soc'y*, 527 F.2d 233, 236 (2d Cir. 1975).

It is my opinion, therefore, that the district court erred in its holding. Contrary to the majority's opinion, I believe that section 287 was enacted to regulate the business of insurance.

2. Section 92: Not Specifically Related to the Business of Insurance

The second step in this McCarran-Ferguson analysis is to determine whether § 92 "specifically relates to the business of insurance." McCarran-Ferguson § 2(b). Because it decided that section 287 was not enacted to regulate the business of insurance, the majority declined to consider this issue. However, there is little doubt that, as the district court determined below, § 92 does *not*

specifically relate to the business of insurance. *Owensboro Nat'l Bank*, 803 F. Supp. at 34-35. Rather, § 92's "primary intent was to strengthen small national banks by providing them with an additional source of revenue." *Id.* (citations omitted). As the district court further stated, the mere fact that "the power granted to the national banks involves insurance does not transform this section into a regulation of the business of insurance." *Id.* at 36. On this issue, the district court's analysis is sound and should be followed by this Court.

The plaintiffs maintain, however, that § 92 does specifically regulate the business of insurance. The Supreme Court has not been explicitly clear how "specific" a federal statute must be to preempt a state law which regulates the business of insurance. The *Fabe* Court came the closest to a firm definition in determining that McCarran-Ferguson calls for a "clear statement rule." *Fabe*, 113 S. Ct. at 2211. According to this rule, a federal statute such as § 92 must "clearly state" that it regulates the business of insurance or otherwise intends to preempt a contrary state law. *Id.* Upon examining the legislative history of McCarran-Ferguson, the Court found that only when "Congress, in its wisdom, [acted] specifically with reference to insurance in enacting the law" would such a law preempt any state statute enacted to regulate the business of insurance. *Id.* at 2211 n.7. Therefore, "'no existing law and no future law should, by mere implication, be applied to the business of insurance.'" *Id.* (quoting 91 Cong. Rec. 1487 (1945)).

The context of § 92 has always been within the regulation of banking rather than insurance. In *United States Nat'l Bank of Oregon v. Independent Insurance Agents of America*, 113 S. Ct. 2173 (1993), in which the Court upheld the viability of § 92, the Court emphasized that § 92 was part of the Federal Reserve Act. *Id.* at 2182. The court in

Barnett Banks relied on the language of *Independent Ins. Agents* stating that § 92 was to be read in context with the other paragraphs around it and the fact that neither the *Independent Ins. Agents* Court nor Congress ever suggested that § 92 was specifically related to the business of insurance. Therefore, § 92 was found not to specifically relate to the business of insurance. *Barnett Banks*, 839 F. Supp. at 843.

Furthermore, no party has cited to any case in support of the contention that § 92 specifically relates to the business of insurance. The banks point to several cases in which other federal statutes were found to "specifically relate to the business of insurance" within the context of McCarran-Ferguson. None of these cases, however, is persuasive or applicable to the issue in this case. In *Hanover Ins. Co. v. Commissioner of Internal Revenue*, 598 F.2d 1211 (1st Cir.), *cert. denied*, 444 U.S. 915 (1979), the statute at issue was an Internal Revenue Service provision dealing exclusively with the taxation of insurance companies. Partially because of the exclusive insurance nature of the statute and partially because the power of federal taxation was not delegated to the states in this instance, *Hanover* is not persuasive here.

In *Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir. 1987), *cert. denied*, 490 U.S. 1035 (1989), the statute at issue was the Longshore and Harbor Workers Compensation Act (LHWCA). Again, the Court in *Jackson* found overwhelming evidence within the language of the statute and its regulations to prove a pervasive regulation of the business of insurance. A similar pervasive intent to regulate the insurance business is not evident in § 92.

In *Hewlett-Packard Co. v. Barnes*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978), an ERISA

provision was at issue. Once again, however, regulation of the business of insurance pervades ERISA. Not only have numerous courts agreed that ERISA specifically relates to the business of insurance, ERISA's "deemer" clause explicitly exempts state employee benefit plans from the preemption language of McCarran-Ferguson.

Finally, plaintiffs and an amicus brief from the American Bankers Association argue that if section 287 is found to regulate the business of insurance, then § 92 must also be found to specifically relate to the business of insurance. According to plaintiffs, common sense dictates that the definition of § 2(b)'s "business of insurance" be applied equally to both Kentucky's section 287 and § 92. The plaintiffs' argument is flawed, however, in its disregard for the exact wording of the statute. *See supra* subsection II.C. Section 2(b) states that a federal statute must "specifically relate[] to the business of insurance." Although this phrase is not clearly defined, the Court in *Fabe* termed it a "clear statement rule." *Fabe*, 113 S. Ct. at 2211. It is apparent from the *Fabe* decision that an analysis of the first clause of § 2(b) requires a broader standard for the state statute at issue than for the federal statute at issue. Furthermore, cases such as *Fabe* reach the very result contested by plaintiffs—that a state statute can be found to regulate the business of insurance without also finding that the federal statute specifically relates to the business of insurance.

III.

Consequently, I would find that McCarran-Ferguson prevents federal preemption of section 287 and I would reverse and remand on that basis.